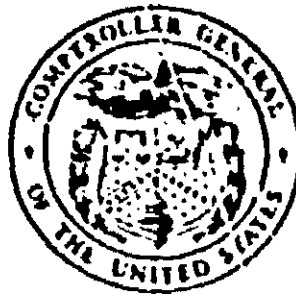


DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20540

FILE: B-207335 DATE: August 9, 1982
MATTER OF: ALB Industries, Incorporated

DIGEST:

1. Protester, suspended from contracting with National Aeronautics and Space Administration, contending it was improperly suspended is interested party under our Bid Protest Procedures because if protest is sustained the protester would be eligible for award.
2. Agency has reasonable basis for suspending company on basis of its being affiliated with previously suspended firm where ownership of company had been transferred by owner of suspended firm to his wife and the company is organized and managed by key employees of the suspended firm and uses facilities and personnel of that firm.

ALB Industries, Inc. protests the rejection of its low bid submitted in response to invitation for bids 10-0067-2, issued by the National Aeronautics and Space Administration (NASA) for modifications to a platform and the vehicle assembly building at Kennedy Space Center, Florida.

NASA conducted a preaward survey on ALB as the apparent low bidder on this procurement and during the survey determined that ALB is an affiliate of New World Construction Company. New World and individuals involved with that firm, including Arthur L. Boschen, Jr., had been suspended by NASA on February 26, 1982, because of evidence that the firm and these individuals "committed irregularities of a serious nature in business dealings with the United States." On May 14, 1982, before any award was made, NASA suspended ALB from contracting with the agency because of the firm's affiliation with New World.

NASA contends that as a suspended bidder ALB is not eligible for award and therefore is not an interested party capable of pursuing a bid protest. 4 C.F.R. § 21.1 (a) (1982). Our Office has held that where a suspended bidder protests that the procuring agency followed improper procurement procedures, the protester is not an interested party, because if our Office determines that the challenged procedures are improper and sustains the protest, the protester would still be ineligible for award. See Computer Sciences Corporation, B-200755, March 6, 1981, 81-1 CPD 181. However, where a bidder for a particular procurement protests that it was improperly suspended by the agency after bid opening and would otherwise be eligible for and entitled to award of the procurement in question, as ALB does here, the protester is an interested party because it obviously has a direct stake in the outcome of the protest. Therefore, we will consider the protest. See 51 Comp. Gen. 703 (1972).

NASA's regulations provide generally that award shall not be made to a suspended firm. See NASA Procurement Regulation (PR) § 1.603(a)(4) (1981 ed.). Rejection of the protester's bid is predicated on the suspension. Consequently, we must consider the propriety of NASA's suspension action. We recognize that the regulations, NASA PR § 1.605-7, provide for a hearing upon request and we note that the protester has requested such a hearing from NASA. While it is not our intention to interfere with that hearing process, we believe our own review is appropriate to insure that the agency, in first suspending a bidder after bid opening, has not acted arbitrarily to avoid awarding a contract to that apparent low bidder.

Upon review of the record and of the applicable regulations, we are unable to find that NASA acted without a reasonable basis. We therefore deny the protest.

NASA regulations provide that business concerns are affiliates of each other when, either directly or indirectly, one concern or individual controls or has the power to control both. In determining whether or not affiliation exists, consideration is given to all appropriate factors, including common ownership, common management, and contractual relationships. NASA PR § 1.600(b).

NASA discovered that ALB was incorporated on October 8, 1980 by Mr. Boschen, the company's sole shareholder, officer, and director. On January 4, 1982, Mr. Boschen transferred all the shares of the company to his wife, Sharon L. Boschen, who became the company's president, treasurer, and director. NASA states that in determining who controls or has the power to control a concern, persons with an identity of interest, such as family members, may be treated as one person.

ALB responds that Mr. Boschen does not own, manage, or control the company. ALB maintains that NASA's treatment of family members as one person discriminates against a wife who controls her own business. ALB contends that this conclusion presumes that the husband controls the wife and that a finding of affiliation on this basis would not have been reached if the roles had been reversed and Mrs. Boschen had been suspended initially and her husband owned another company.

NASA maintains that since Mr. Boschen is the former sole shareholder and president of ALB and the husband of ALB's current sole shareholder and president, it is reasonable to believe that he has the power to control ALB since family members--here a married couple--generally have an identity of interest. We think this is a reasonable conclusion on NASA's part. Moreover, we note that ALB has not presented any evidence that Mr. and Mrs. Boschen do not in fact have an identity of interest, nor has it presented any actual evidence of discrimination on the basis of sex. Unfair or prejudicial motives cannot be attributed to the agency on the basis of inference or supposition. Since this allegation amounts only to speculation about possible bias or unfairness on the part of NASA without any factual substantiation, we find this allegation is without merit. Health Management Systems, B-200775, April 3, 1981, 81-1 CPD 255.

Moreover, NASA discovered several other connections between the two firms other than the marital relationship of the Boschens. Mrs. Boschen was the Corporate Secretary for New World and as recently as April 1, 1982, represented New World in business discussions with NASA.

The Vice President of ALB is also the Area Supervisor for New World and the Corporate Secretary of ALB is the Office Manager for New World. Furthermore, after bid opening, Mr. Boschen asked a NASA contracting official if New World could be a subcontractor to ALB. ALB then used New World office space for a preaward conference with NASA and, during that conference, Mrs. Boschen indicated that in performing the contract ALB intended to use welders employed by New World.

ALB argues that Mrs. Boschen and the employees of ALB who also work for New World are not key employees of New World because they never had the authority to bind New World. It also states that none of them has ever been an owner of New World. NASA's position, however, is simply that they are key employees because they report directly to Mr. Boschen and have positions of authority in the company. ALB does not deny that these individuals have such positions, nor that these employees of New World are now serving as officers or employees of ALB, which is a construction contractor like New World. As to the furnishing of assistance, ALB contends that it does not have a contractual relationship with New World. However, ALB has not refuted that ALB has used New World facilities and intends to use its workers.

Under the circumstances, it appears that NASA had a reasonable basis for taking the action it did. Therefore, the protest is denied.

for Milton J. Arnold
Comptroller General
of the United States